Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1975

No. 76-85

JERRY DALE HUNTER, Petitioner,

versus

STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

JAMES E. FERGUSON, II
JAMES C. FULLER, JR.
LOUIS L. LESESNE, JR.
951 South Independence Boulevard
Charlotte, North Carolina 28202

ADAM STEIN
Post Office Box 720
Chapel Hill, North Carolina 27514

Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE

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October Term, 1975

No. _____

JERRY DALE HUNTER,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

The Petitioner, Jerry Dale Hunter, respectfully prays that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals entered in this proceeding on February 4, 1976.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals was filed February 4, 1976, and is reported at 28 N. C. App. 456, 221 S. E.2d 837. Petitioner timely appealed the decision of the North Carolina Court of Appeals to the North Carolina Supreme Court and, simultaneously petitioned that Court for discretionary review of the decision of the Court of Appeals. Petitioner's appeal was dismissed and discretionary review denied in an Order issued on March 2, 1976. That Order is reported at 289 N. C. 453.

Copies of the pertinent proceedings below are appended to this petition as Appendices A (opinion of the Court of Appeals) and B (order of the Supreme Court).

JURISDICTION

The Judgment Dismissing Appeal and Order Denying Petition for Discretionary Review was entered by the North Carolina Supreme Court on March 2, 1976. This petition is filed within 90 days of the issuance of that Judgment and Order.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

Whether Mullaney v. Wilbur, 421 U. S. 684 (1975), should apply to a case tried prior to, but pending on direct appeal at the time of decision.

PROVISIONS INVOLVED

Amendment XIV, Constitution of the United States, reads in pertinent part, as follows:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law; .....

STATEMENT OF THE CASE

Facts: Petitioner was indicted for first degree murder by the grand jury of Madison County, North Carolina, in the death of Jonah Massey on January 1, 1974. He was tried for second degree murder. The incident arose on December 22, 1973, at a restaurant near Marshall, North Carolina. There had been an altercation between petitioner on the one hand and Jonah Massey and his son, Cordell Massey, on the other.

The State's evidence at trial tended to show that petitioner had initiated an affray, resulting in Jonah Massey's death. Petitioner's evidence was that the Massey's had attacked him and that he had acted in self defense. The North Carolina Court of Appeals characterized the evidence at trial as follows:

> At the trial the State's evidence tended to show: On 22 December 1973 Jonah Massey was eighty-five years old, was in good health and was active. His son, Cordell, drove him to a restaurant at about 7:00 p.m. on that day. As Cordell was parking his car, the defendant arrived and struck Cordell and attacked both Cordell and

> Massey when they got out of the car. The defendant knocked Massey to the pavement with a section of pipe, and Cordell stabbed defendant in self-defense. Massey was treated in the hospital emergency room and released that night. Massey was thereafter bedridden and incoherent until 26 December 1973 when he was admitted to a hospital. Massey died on 1 January 1974. The immediate cause of death was a combination of pneumonia, meningitis, and pericarditis. The blows received on 22 December could have initiated the chain of events which produced death.
>
> Defendant presented evidence that both Cordell and Massey attacked him without provocation as he walked by their car in the restaurant parking lot; that both of the Masseys had knives and cut him; that he struck back and tried to get away from them and that he used the pipe in self-defense.[1] 28 N. C. App. at 466.

The trial court instructed the jury that if the defendant acted properly in self-defense, he would not be guilty. It further instructed the jury that:

> If you find from the evidence in the case that the defendant Hunter unlawfully killed Jonah Massey, not with malice, but in defending himself, and that he used excessive force – that is, more force than was reasonably necessary under the circumstances, or more force than reasonably appeared necessary to the defendant at the time and place under the circumstances – to protect himself from death or great bodily harm, then it would be your duty to return a verdict of guilty of manslaughter. Manslaughter, or voluntary manslaughter, is the unlawful killing of a human being without malice. R. 84.

However, under the usual and pre-Mullaney v. Wilbur, 421 U.S. 684 (1975) North Carolina practice, the trial court's instructions placed the burden of establishing self-defense upon petitioner. The jury was told: "(I)n order to excuse the defendant's act entirely, on the grounds of self-defense, the defendant must show – again not beyond a reasonable doubt, or not by the greater weight of the evidence, but simply to your satisfaction – that he acted in self-defense." R. 82-83.

The jury found defendant guilty of voluntary manslaughter thus finding that petitioner had acted in self-defense but also finding that petitioner had failed to meet his burden of satisfying the jury that the force he had employed was not excessive.[2]

How the Federal Questions were Raised: At the conclusion of petitioner's trial, he timely filed Notice of Appeal to the North Carolina Court of Appeals. In the record on appeal, petitioner excepted to those portions of the trial Court's instructions

[1]Petitioner offered testimony independent of his tending to show that the affray was initiated by the Masseys. The testimony of Fred Grasty and Marvin Glenn Searcy both showed that the first blows they saw were delivered by one of the Masseys. R. 39, 61. (Page citations are to the printed record in the North Carolina Court of Appeals.)

[2]The lack of excessive force was one of the elements included in the trial Court's definition of self-defense, on which petitioner was required to assume the burden of proof. R. 83.

placing the burden on petitioner to show that he had acted in self-defense, (Exceptions 57, 58, 60), R. 83, 84 and 89, and to the trial Court's failure to charge that the burden of proof was upon the State to prove every element beyond a reasonable doubt (Exception No. 63).[3] R. 89.

The North Carolina Court of Appeals, relying upon State v. Hankerson, 288 N. C. 632, 220 S. E.2d 575 (1975) rejected petitioner's contentions that he had been denied due process by the trial Court's jury instructions which placed the burden of proving self-defense upon him. The Supreme Court of North Carolina had ruled in Hankerson that the traditional North Carolina practice of placing the burden on the defendant to prove self-defense is unconstitutional.

> We hold that by reason by the decision in Mullaney the Due Process Clause of the Fourteenth Amendment prohibits the use of long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense.[4] 288 N.C. at 643.

[3]Under North Carolina procedure, there is no requirement that an objection or exception to an erroneous instruction be taken at the time of trial. It is considered timely if exception is first taken and error assigned in the record on appeal. Cherry v. Atlantic Coast Line R. Co., 186 N. C. 263, 119 S. E. 361 (1923); State v. Lambe, 232 N.C. 570, 61 S. E.2d 608 (1950).

The Court, however, "declin(ed), without guidance from the (United States) Supreme Court, to give (Mullaney) retroactive effect." 288 N. C. at 652.

The North Carolina Court of Appeals, in its reliance upon Hankerson, has thus determined that the trial Court's instructions violated petitioner's rights as protected by the Due Process Clause of the Fourteenth Amendment but has refused to afford him any relief.

Petitioner subsequently sought to appeal to the North Carolina Supreme Court[5] and, alternatively, petitioned that Court for discretionary review.[6] By a Judgment and Order dated March 2, 1976, the North Carolina Supreme Court, without opinion, granted the State's motion to dismiss the appeal for want of a substantial constitutional question and denied petitioner's petition for discretionary review. 284 N. C. 453.

[4]Only the issue of self-defense was raised by the evidence in Hankerson. The evidence did not present the issue of a killing in the heat of passion or sudden provocation although there had been a jury instruction on that issue. The Supreme Court determined the applicability of Mullaney to the heat of passion defense to give guidance to trial judges in future cases. 288 N.C. at 648-649.

[5]See, N.C.G.S. 7A-30(1).

[6]See, N.C.G.S. 7A-31.

REASONS WHY THE WRIT SHOULD ISSUE

I.

CONCERN FOR THE INTEGRITY OF THE FACT-FINDING PROCESS, ON WHICH MULLANEY v. WILBUR RESTS, REQUIRES THAT THE CASE APPLY HERE.

Petitioner was convicted on February 28, 1975, prior to this Court's decision in Mullaney v. Wilbur which was filed on June 9, 1975.[7] The North Carolina Supreme Court properly recognized in State v. Hankerson, supra,[8] that Mullaney v. Wilbur applied to self-defense as well as sudden provocation. It held that in future cases, the prosecution must bear the burden of proving the absence of self-defense. However, the North Carolina Supreme Court declined to apply its decision to cases tried before the date of the Mullaney decision.[9]

The factors traditionally considered by this Court in determining whether to accord a case retroactive application demonstrate that Mullaney should be so applied. The initial and primary inquiry has consistently been whether the design of the new constitutional rule is to insure the reliability and integrity of the fact-finding process. Roberts v. Russell, 392 U.S. 293 (1968). Where this factor furnishes the rationale for the new rule, the case will be given retroactive effect without regard for

[7]Mullaney v. Wilbur held that it is a violation of the Due Process Clause to require a criminal defendant charged with murder to prove the element of sudden provocation, in order to negate the element of malice and to reduce culpability from murder to manslaughter.

Like the law of Maine, the law of North Carolina has traditionally required the prosecution in a murder trial to establish

> beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death. . . . .

State v. Hankerson, 288 N.C. 632, 647, 220 S. E.2d 575, 586 (1975).

Once such a showing has been made, there arose two presumptions: first, as in Mullaney v. Wilbur, supra, that the killing was done with malice, and, second, that it was unlawful. State v. Hankerson, supra.

In order to rebut the presumption of unlawfulness (therefore totally exonerating the defendant, rather than merely reducing the degree of the crime as in the case of malice) the instructions of the trial Judge placed on petitioner the burden of proving that his actions were taken in self-defense. The effect of this instruction was to relieve the prosecution of proving unlawfulness, one of the elements of the crime, both of murder and of the lesser-included offense of manslaughter.

[8]Hankerson was decided by the Supreme Court of North Carolina prior to the decision of the North Carolina Court of Appeals in petitioner's case and supplied the rationale for the Court of Appeals in affirming petitioner's conviction.

The factors traditionally considered by this Court in determining whether to accord a case retroactive application demonstrate that Mullaney should be so applied. The initial and primary inquiry has consistently been whether the design of the new constitutional rule is to insure the reliability and integrity of the fact-finding process. Roberts v. Russell, 392 U.S. 293 (1968). Where this factor furnishes the rationale for the new rule, the case will be given retroactive effect without regard for

[9]Even if the Court declines to accord full retroactive application to Mullaney, petitioner urges that such application should at least be accorded those cases still on direct appeal, as was this case, at the time of the Court's decision in Mullaney. This Court has held that the retroactivity question comes into play only on collateral attack where the charge in the law occurs only after final judgment. Linkletter v. Walker, 381 U.S. 618 (1965). But cf. Johnson v. New Jersey, 384 U.S. 719 (1966), holding that that case will not apply to cases still on direct appeal.

the additional factors of good faith reliance by the authorities or the severe impact on the administration of justice. Williams v. United States, 401 U.S. 646, 653 (1971).[10]

Both Mullaney v. Wilbur and In Re Winship, 397 U.S. 358 (1970), were premised on a recognition that variations of the quantum and burden of proof involved posed serious threats to the reliability of criminal adjudications.[11] They recognized that these were important societal interests served by the preservation of the integrity and reliability of jury verdicts in criminal cases and that the requirement of the prosecution's proving all elements of the crime beyond a reasonable doubt was an integral part of that process. This Court has recognized this principle in Ivan V. v. City of New York, 407 U.S. 203 (1972), holding Winship to be fully retroactive. The defect in Winship was characterized as one "that substantially impairs the truth finding function," 407 U.S. at 205, requiring full retroactive application. Where a new constitutional doctrine is premised on that concern,

> neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

407 U. S. at 204, quoting Williams v. United States, supra, 401 U.S. at 653.

The facts of the present case present an even stronger argument for retroactivity than did Winship, where the burden of proof remained with the prosecution throughout, the defect being simply the quantum required. In both Mullaney v. Wilbur and this case, the defendant had the more onerous burden of assuming the burden of proof to negate the presumptions of malice and unlawfulness, respectively. Furthermore, the stigma arising out of a criminal conviction is far more severe than that from the juvenile proceeding involved in Winship, which purported to have a benevolent origin. See Mullaney v. Wilbur, supra, 421 U.S. at 700.

Petitioner here was tried on a charge of second degree murder, but was convicted of voluntary manslaughter. The basic fact of the killing was undisputed, and the primary question for the

[10] This Court's decisions denying retroactive application have involved questions of protection of constitutional rights which do not affect the reliability of the fact-finding function; rather, they have been concerned with the protection of individual rights. See, e.g., Linkletter v. Walker, 381 U.S. 618 (1965) (exclusionary rule); Tehan v. Shott, 382 U.S. 406 (1966) (comment on defendant's failure to testify). Such cases raise no question as to the guilt of those convicted in prior trials. See Williams v. United States, supra, 401 U.S. at 653.

[11] That Mullaney is to be applied retroactively is suggested by the action of this Court in vacating and remanding Burko v. Maryland, U.S. , 45 L.Ed.2d 667 (1975) and Castro v. Regan, U.S. , 45 L.Ed.2d 667 (1975) for further consideration in light of Mullaney v. Wilbur.

jury's decision was which of the parties initiated the affray.

Implicit in the jury's verdict was an acceptance of at least a portion of petitioner's self-defense claim. The Court instructed the jury that if it believed that petitioner acted in self-defense but used excessive force, it should find him guilty of manslaughter. R. 84.

The issue of self-defense was a very close one, which petitioner was able to prevail upon in part. It is in such a case that the issue of the allocation of the burden of proof becomes a very real and meaningful one. It may have well determined the result of this case. See Speiser v. Randall, 357 U.S. 513, 520-521 (1958). It is quite possible that, had the trial Court instructed the jury that the State was required to assume the burden of proof as to the absence of self-defense, petitioner would have been acquitted. That the articulated concerns in Mullaney v. Wilbur and Winship are real and meaningful is aptly demonstrated by the facts of this case. The result here poses the very threat that the Court in Winship was anxious to avoid:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

In Re: Winship, supra, 397 U.S. at 364.

This Court has frequently recognized the importance of the issue of retroactive application of a new constitutional doctrine.

The issue posed here similarly raises a significant and important question as to the scope of Mullaney v. Wilbur, making it appropriate that the writ should issue.

II.

THERE EXISTS AMONG STATE COURTS A CONFLICT AS TO THE RETROACTIVE APPLICATION OF MULLANEY V. WILBUR WHICH SHOULD BE RESOLVED BY THIS COURT.

The Maryland Court of Special Appeals has recently held in Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975) that Mullaney v. Wilbur should be accorded retroactive application. That decision squarely conflicts with the decisions fo the North Carolina courts in this case and in Hankerson.

This Court has recognized that such a conflict on an important federal question affords an appropriate occasion for granting the writ. United States v. Oregon, 366 U.S. 643, 645 (1961); Fuller v. Oregon, 417 U.S. 40, 42 (1974).

CONCLUSION

For the reasons stated above, the Court should grant the writ of certiorari to the North Carolina Court of Appeals.

Respectfully submitted,

James C. Fuller, Jr.
Chambers, Stein, Ferguson & Becton
Suite 730
951 S. Independence Blvd.
Charlotte, N. C. 28202

Louis L. Lesesne, Jr.
Chambers, Stein, Ferguson & Becton
Suite 730
951 S. Independence Blvd.
Charlotte, N. C. 28202

James E. Ferguson, II
Chambers, Stein, Ferguson & Becton
Suite 730
951 S. Independence Blvd.
Charlotte, N. C. 28202

Adam Stein
Chambers, Stein, Ferguson & Becton
Post Office Box 720
Chapel Hill, N. C. 27514

Attorneys for Petitioner

APPENDICES

Cite as 221 S.E.2d 837

STATE of North Carolina
v.
Jerry Dale HUNTER.
No. 7524SC642.

Court of Appeals of North Carolina

Feb. 4, 1976.

Defendant was convicted in the Superior Court, Madison County, Harry Martin J., of voluntary manslaughter and he appealed. The Court of Appeals, Martin J., held that impropriety of argument of attorney for private prosecution that, if jury let defendant go free, "then law and order in this country might as well go, too," was not sufficiently grave to entitle defendant to a new trial; that inasmuch as trial was conducted before June 9, 1975, the date of Mullaney decision of the United States Supreme Court, defendant was not entitled to reversal of conviction on ground that trial court deprived him of due process by charging that he must show to the jury's satisfaction that there was no malice on his part or that elements of self-defense existed and rendered the killing excusable.

No error.

1. Criminal Law 730(14)

Inasmuch as trial judge sustained defendant's objection to argument of attorney for private prosecution that, if jury let defendant go free, "then law and order in this country might as well go, too," the impropriety was not sufficiently grave to entitle defendant to a new trial.

2. Courts 100(1)

Defendant tried before June 9, 1975 was not entitled to reversal of conviction on theory that trial court deprived him of due process by charging that he must show to jury's satisfaction that there was no malice on his part or that elements of self-defense existed rendering the killing excusable, even though the instructions violated concept of due process announced on that date by the United States Supreme Court in the Mullaney decision.

Defendant was charged in a bill of indictment with first degree murder of Jonah Massey. He was tried for second degree murder, having pleaded not guilty to the charge.

At the trial the State's evidence tended to show: On 22 December 1973 Jonah Massey was eighty-five years old, was in good health and was active. His son, Cordell, drove him to a restaurant at about 7:00 p.m. on that day. As Cordell was parking his car, the defendant arrived and struck Cordell and attacked both Cordell and Massey when they got out of the car. The defendant knocked Massey to the pavement with a section of pipe, and Cordell stabbed defendant in self-defense. Massey was treated in the hospital emergency room and released that night. Massey was thereafter bedridden and incoherent until 26 December 1973 when he was admitted to a hospital. Massey died on 1 January 1974. The immediate cause of death was a combination of pneumonia, meningitis, and pericarditis. The blows received on 22 December could have initiated the chain of events which produced death.

Defendant presented evidence that both Cordell and Massey attacked him without provocation as he walked by their car in the restaurant parking lot; that both of the Masseys had knives and cut him; that he struck back and tried to get away from them and that he used the pipe in self-defense.

The jury returned a verdict of guilty of the offense of voluntary manslaughter and from judgment imposing a prison sentence, defendant appealed.

Atty. Gen. Rufus L. Edmisten by Associate Atty. James Wallace, Jr., Raleigh, for the State.

Swain & Leake by A. E. Leake, Asheville, for defendant-appellant.

MARTIN, Judge.

(1) Defendant contends that the court erred in failing to instruct the jury that the argument of the attorney for the private prosecution was improper, and not to consider it. The full argument of the attorney does not appear in the record. The only portion from the argument excepted to is shown in the record as follows:

"MR. HOWELL: . . . If you let him go free, then law and order in this country might as well go, too.

OBJECTION SUSTAINED. Defendant excepts.

Exception No. 54"

Defendant now contends that he suffered prejudicial error in that the trial judge, after sustaining the objection, failed to go further and to instruct the jury that this line of argument was improper and not to be considered, although the prompt objection gave him ample opportunity for such an instruction.

Defendant cites and relies upon *State v. Little,* 228 N. C. 417, 45 S.E.2d 542 (1947), and *State v. Hawley,* 229 N.C. 167, 48 S.E.2d 35 (1948). These cases are distinguishable from the instant case.

The language of the attorney for the private prosecution exceeded the bounds of propriety. However, the record shows that the trial judge sustained defendant's objection, thereby avoiding the evil of approving or sanctioning the language of the attorney.

In 2 Strong, N.C. Index 2d, Criminal Law, 102, at p. 642, we find: "The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed."

We do not deem the impropriety here sufficiently grave to entitle defendant to a new trial.

(2) Defendant contends the trial court deprived him of due process by charging the jury that he must show to the jury's satisfaction that there was no malice on the defendant's part or

that the elements of self-defense existed and rendered the killing excusable. This contention is based on the case of *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d. 508, which examined and found unconstitutional a Maine requirement that a defendant charged with murder must prove, "by a fair preponderance of the evidence," that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter.

In the recent case of *State v. Hankerson,* N.C., 220 S.E.2d 575 (1975), our Supreme Court held that ". . . by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense.The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney.* We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975."

The instant case was tried at the 24 February 1975 Regular Criminal Session of Madison County Superior Court. The trial judge instructed the jury in accordance with our law of homicide as it stood at the time. Therefore, the defendant is not entitled to the benefit of the *Mullaney* doctrine.

For the reason given, in the trial we find

No error.

MORRIS and PARKER, JJ., concur.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HUNTER

No. 77 PC.

Case below: 28 N.C. App. . . .

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1976.

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In The

Supreme Court of the United States

October Term, 1976

JERRY DALE HUNTER,

Petitioner,

v

STATE OF NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

BRIEF OF RESPONDENT
STATE OF NORTH CAROLINA

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals was filed February 4, 1976, and is reported at 28 N.C. App. 456, 221 S.E. 2d 837. Petitioner appealed the decision of the North Carolina Court of Appeals to the North Carolina Supreme Court, and simultaneously petitioned that Court for discretionary review of the decision of the Court of Appeals. Petitioner's appeal was dismissed and discretionary review denied in an Order issued on March 2, 1976. That order is reported at 289 N.C. 453. Copies of pertinent proceedings below are appended to Petitioner's Petition for a Writ of Certiorari to the North Carolina Court of Appeals, Appendices A (Opinion of the Court of Appeals) and B (Order of Supreme Court).

JURISDICTION

Petitioner attempts to invoke jurisdiction of this Court under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

WHETHER *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) SHOULD APPLY TO A CASE TRIED PRIOR TO, BUT PENDING ON DIRECT APPEAL AT THE TIME OF, DECISION.

PROVISIONS INVOLVED

Amendment XIV, Constitution of the United States, reads in pertinent part, as follows:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Petitioner was indicted for first degree murder by the grand jury of Madison County, North Carolina, in the death of Jonah Massey on January 1, 1974. He was tried for second degree murder. The incident arose on December 22, 1973, at a restaurant near Marshall, North Carolina. There had been an altercation between petitioner on the one hand and Jonah Massey and his son, Cordell Massey, on the other.

The State's evidence at trial tended to show that petitioner had initiated an affray, resulting in Jonah Massey's death. Petitioner's evidence was that the Masseys had attacked him and that he had acted in self-defense. The North Carolina Court of Appeals characterized the evidence at trial as follows:

> "At the trial the State's evidence tended to show: On 22 December 1973 Jonah Massey was eighty-five years old, was in good health and was active. His son, Cordell, drove him to a restaurant at about 7:00 p.m. on that day. As Cordell was parking his car, the defendant

> arrived and struck Cordell and attacked both Cordell and Massey when they got out of the car. The defendant knocked Massey to the pavement with a section of pipe, and Cordell stabbed defendant in self-defense. Massey was treated in the hospital emergency room and released that night. Massey was thereafter bedridden and incoherent until 26 December 1973 when he was admitted to a hospital. Massey died on 1 January 1974. The immediate cause of death was a combination of pneumonia, meningitis, and pericarditis. The blows received on 22 December could have initiated the chain of events which produced death.
>
> "Defendant presented evidence that both Cordell and Massey attacked him without provocation as he walked by their car in the restaurant parking lot; that both of the Masseys had knives and cut him; that he struck back and tried to get away from them and that he used the pipe in self-defense." 28 N.C. App. at 466.

The trial court instructed the jury that if the defendant acted properly in self-defense, he would not be guilty. It further instructed the jury that:

> "If you find from the evidence in the case that the defendant Hunter unlawfully killed Jonah Massey, not with malice, but in defending himself, and that he used excessive force — that is, more force than was reasonably necessary under the circumstances, or more force than reasonably appeared necessary to the defendant at the time and place under the circumstances — to protect himself from death or great bodily harm, then it would be your duty to return a verdict of guilty of manslaughter. Manslaughter, or voluntary manslaughter, is the unlawful killing of a human being without malice." R. 84.

The jury was told: "[I]n order to excuse the defendant's act entirely, on the grounds of self-defense, the defendant must show — again not beyond a reasonable doubt, or not by the

greater weight of the evidence, but simply to your satisfaction — that he acted in self-defense." R. 82-83. The jury found defendant guilty of voluntary manslaughter. At the conclusion of petitioner's trial, he timely filed Notice of Appeal to the North Carolina Court of Appeals. In the record on appeal, petitioner excepted to those portions of the trial Court's instructions placing the burden on petitioner to show that he had acted in self-defense, (Exceptions 57, 58, 60), R. 83, 84 and 89, and to the trial Court's failure to charge that the burden of proof was upon the State to prove every element beyond a reasonable doubt (Exception No. 63). R. 89.

The North Carolina Court of Appeals, relying upon *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975) rejected petitioner's contentions that he had been denied due process by the trial Court's jury instructions which placed the burden of proving self-defense upon him. The Supreme Court of North Carolina had ruled in *Hankerson* that the traditional North Carolina practice of placing the burden on the defendant to prove self-defense is unconstitutional.

> "We hold that by reason by the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense." 288 N.C. at 643.

The Court, however, "declin(ed), without guidance from the (United States) Supreme Court, to give *Mullaney* retroactive effect." 288 N.C. at 652.

Petitioner subsequently sought to appeal to the North Carolina Supreme Court[1] and, alternatively, petitioned that Court for discretionary review.[2] By a Judgment and Order dated

1. See N.C.G.S. §7A-30(1).
2. See N.C.G.S. §7A-31.

March 2, 1976, the North Carolina Supreme Court, without opinion, granted the State's Motion to Dismiss the appeal for want of a substantial constitutional question and denied petitioner's petition for discretionary review. 284 N.C. 453.

ARGUMENT

THE CASE OF *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) SHOULD NOT APPLY TO A CASE TRIED PRIOR TO, BUT PENDING ON DIRECT APPEAL AT THE TIME OF, DECISION; THAT IS, *MULLANEY* SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

The defendant cites the case of *Ivan v. City of New York*, 407 U.S. 203, which gave retroactive effect to *In re Winship*, 397 U.S. 358, a case on which this Court relied heavily in reaching its decision in *Mullaney*. Defendant contends that the *Ivan* ruling calls for this Honorable Court to hold applicable the new rules set forth in *Mullaney*. In *Winship*, the Court held that proof beyond a reasonable doubt is essential to due process at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.

The Court held the precedent retroactive in *Ivan* on the grounds that the reasonable doubt standard was indispensable in the entire criminal fact-finding process as it related to a juvenile. The State contends that this Court should properly hold, however, that the truth-finding process as it related to the defense of self-defense before the *Mullaney* decision was not so substantially impaired as to justify complete retroactive effect of the new rule as set forth in that case. A criterion which this Court has considered significant in determining the retroactivity of a new rule is the effect which retroactive application of the new rule would have upon the administration of justice. Thus, it has been recognized that if retroactive application of the new rule would impose a substantial burden upon the administration of justice, this is a factor in favor of denying the rule retroactive effect.

For example, in *Johnson v. New Jersey*, 384 U.S. 719 (1966), this Court denied retroactive effect to new rules concerning custodial interrogation. The Court stated that retroactive application of the new rule would seriously disrupt the administration of criminal law; that it would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards; and that prior to the announcement of the new rules, few states were under an enforced compulsion on account of local law to grant requests for the assistance of counsel or to advise accused persons of their privilege against self-incrimination during custodial interrogation, as required by the new rules.

Holding that new rules pertaining to identification at police lineups were not retroactively applicable, this Court, in *Stovall v. Denno*, 388 U.S. 293 (1967), stated that retroactive application of such new rules would seriously disrupt the administration of criminal law. It was noted that at the very least the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in police lineup identification evidence, and whether, in any event, the admission of the evidence was harmless error, and that inquiry would be handicapped by the unavailability of witnesses and dim memories. The State would submit that to give retroactive effect to the *Mullaney* case would likewise seriously impose a substantial burden upon the administration of justice in the State.

Furthermore, it is respectfully submitted that the cases previously decided by this Honorable Court indicate so strongly that *Mullaney* should not be given retroactive effect that this Court need not examine the issue separately and need not grant the Petition for Writ of Certiorari.

In refusing to attach retroactive effect to *Mullaney* the Supreme Court of North Carolina, *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), ably stated its reasons as follows:

"While *Mullaney* relied heavily on *Winship* and *Winship* was held to be retroactive in *Ivan v. City of New York*, 407 U.S. 203 (1972), it does not necessarily follow that *Mullaney* will be given retroactive effect.

"In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court seems to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the rule is designed to protect the reliability of the fact finding process and 'the constitutional error presents a serious risk that the issue of guilt or innocense may not have been reliably determined' then it has been said that the decision will on this basis alone be given full retroactive effect. *Ivan v. City of New York*, supra (holding *In re Winship*, supra, retroactive); *Roberts v. Russell*, 392 U.S. 293 (1968) (holding *Bruton v. United States*, 391 U.S. 123 (1968) retroactive).

"If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions, *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), even though the new rule may have been 'foreshadowed' by intervening cases, *Desist v. United States*, *supra* at 248, and the effect on the administration of justice of retroactive application, *Id.* at 251, not only in the nation as a whole but within the particular jurisdictions affected. *Tehan v. United States ex rel. Shott*, *supra* at 418-419.

"Although the first factor listed is clearly the most important, how that factor is approached by the Supreme Court seems sometimes to depend on analysis of the other two factors. *Compare Tehan v. United States ex rel. Shott*, *supra* (holding *Griffin v. California*, 380 U.S. 609 (1965) not retroactive), *with Stovall v. Denno*, 388 U.S. 293 (1967) (holding *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive). In holding *Griffin*, which declared unconstitutional the California practice of comment-

ing on a defendant's failure to take the stand, not to be retroactive the Supreme Court in *Tehan* recognized that, although only six states would be affected by *Griffin*, almost every trial in those six states going back many years might have to be upset if *Griffin* were made retroactive. Noting such a devastating impact on the administration of justice, the Supreme Court said:

> 'Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available.' *Tehan v. United States ex rel. Shott, supra* at 418-419.

"*Mullaney* and *Winship* are poles apart in terms of extent of reliance on previous rules and the effect on the administration of justice of retroactive application. It seems clear that the Supreme Court saw no reliance by New York on previous rules in *Winship*. It traced almost 100 years of cases in which it had 'assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.' *In re Winship, supra* at 362. It considered *In re Gault*, 387 U.S. 1 (1967) as an express rejection of the notion that the Due Process Clause was inapplicable to juvenile proceedings. *In re Winship, supra* at 365. *Winship*, furthermore, involved a juvenile proceeding. Its impact, consequently, on the administration of justice in New York would obviously be less than a rule which applies to all homicide cases.

"The jury instructions here under attack are based upon rules which have been firmly with us for over one hundred years. Retroactive application of *Mullaney* in this State would, furthermore, have the same sort of affect, recognized in *Tehan*, as *Griffin* retroactivity would have had in California and other jurisdictions. As of June 30, 1975, there were 269 inmates in prison in this State who had been convicted of first degree mur-

der serving sentences of life imprisonment or awaiting execution, and 728 inmates in prison having been convicted of second degree murder serving sentences ranging from two years to life. State Correctional Statistical Abstract for the Second Quarter, 1975. If *Mullaney* is to be applied retroactively new trials might have to be awarded in many cases decades old.

"A number of other jurisdictions would, we believe, be similarly affected. In the following seven jurisdictions the defendant has (or had) the burden to prove by a preponderance of the evidence heat of passion on sudden provocation (or 'extreme emotional distress') to reduce murder to manslaughter: *Delaware, Fuentes v. State*, 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975); *Hawaii*, (*Mullaney* would probably affect cases in which the appeal was finally determined prior to August 27, 1971. *Compare State v. Santiago*, 53 Haw. 254, 492 P. 2d 657 (1971) *with State v. Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971)); *Maine, Mullaney v. Wilbur, supra; Maryland, Wilson v. State*, 261 Md. 551, 276 A. 2d 214 (1971); *Wilson v. State*, 28 Md. App. 168, 343 A. 2d 537 (1975); *Burko v. State*, 19 Md. App. 645, 313 A. 2d 864 (1974) vacated 422 U.S. 1003, 95 S.Ct. 2624 (1975); *Massachusetts, Comm. v. Johnson*, ___ Mass. App. ___, 326 N.E. 2d 355 (1975) restating the rule of *Comm. v. York*, 50 Mass. (9 Met.) 93 (1845); *Cf. Comm. v. Gagne*, ___ Mass. ___, 326 N.E. 2d 907, 910 (1975); *New York, People v. Balogun*, 372 N.Y.S. 2d 384 (N. Y. Supreme Ct. Kings County 1975); *Tennessee, Hawkins v. State*, 527 S.W. 2d 157 (Tenn. App. 1975). If, as we believe, *Mullaney* prohibits requiring the defendant to prove that he acted in self-defense by a preponderance of the evidence when that issue is properly presented the following seven jurisdictions would be adversely affected: *Georgia, Chandle v. State*, 230 Ga. 574, 198 S.E. 2d 289 (1973); *See also Henderson v. State*, ___ Ga. ___, 218 S.E. 2d 612 (1975) (citing *Mullaney*); *Ohio, State v. Poole*, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973) (for cases prior to January 1, 1974, the effective date of Ohio Rev. Code Ann. § 2901.05 (Page 1975) which probably corrects Ohio law);

Pennsylvania, Comm. v. Cropper, ... Pa. ...., 345 A. 2d 645 (1975) (intimating that *Mullaney* may affect Pennsylvania); *Comm. v. Carbonetto,* 455 Pa. 93, 314 A. 2d 304 (1974); *Comm. v. Winebrenner,* 439 Pa. 73, 265 A. 2d 108 (1970); *Rhode Island, State v. Mellow,* 107 A. 871 (1919); *South Carolina, State v. Judge,* 208 S.C. 497, 38 S.E. 2d 715 (1946); *Texas, Parkman v. State,* 149 Tex. Cr. 101, 191 S.W. 2d 743 (1945) (at least in cases tried before January 1, 1974, the effective date of the new Texas Penal Code §§ 2.03, 9.02, 9.31 (Vernon 1974), which probably corrects Texas law in this respect); *West Virginia, State v. Collins,* 154 W. Va. 771, 180 S.E. 2d 54 (1971).

"Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

"We concede that the purpose of the *Mullaney* rule, to insure a reliable determination of the question of guilt, or the degree of guilt, weighs in favor of retroactivity. Yet the Supreme Court has recognized that 'the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities.' *Williams v. United States,* 401 U.S. 646, n. 7 (1971); *Stovall v. Denno, supra.* While in *Winship* there could be no question that the standard of proof employed was determinative on the issue of guilt, *In re Winship, supra,* n. 2, whether the jury instructions condemned in *Mullaney* and even more clearly those under attack here would in the final analysis be so determinative to a jury so instructed is a matter of pure speculation.

"We note that both cases from other jurisdictions which have so far considered the question, have determined that *Mullaney* should not be given retroactive effect. *Fuentes v. State, supra* (Delaware); *People v. Balogun, supra* (New York)."

CONCLUSION

For the above stated reasons, this Honorable Court should

deny Petitioner's Writ of Certiorari to the North Carolina Court of Appeals.

Respectfully submitted,

RUFUS L. EDMISTEN
ATTORNEY GENERAL

JACOB L. SAFRON
SPECIAL DEPUTY
ATTORNEY GENERAL

JAMES WALLACE, JR.
ASSISTANT ATTORNEY
GENERAL

NORTH CAROLINA
DEPARTMENT OF JUSTICE
POST OFFICE BOX 629
RALEIGH, NORTH CAROLINA
27602

Attorney for Respondent